

CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN ROBERT GRIMES,

Defendant and Appellant.

C058369

(Super. Ct. No.
05CR8504)

APPEAL from a judgment of the Superior Court of Amador County, David S. Richmond, Judge. Affirmed.

Gregory Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Carlos A. Martinez and Wanda Hill Rouzan, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant John Robert Grimes entered unconditional pleas of guilty to battery with serious bodily injury (Pen. Code, § 243,

* Pursuant to California Rules of Court, rule 8.110, this opinion is certified for publication with the exception of the Facts and part II of the Discussion.

subd. (d), further section references are to this code; count I) and assault by means likely to produce great bodily injury (§ 245, subd. (a)(1); count II). He was sentenced on count I to state prison for the low term of two years with 141 days of presentence credit. Sentence on count II was stayed pursuant to section 654.

On appeal, defendant contends the trial court abused its discretion by imposing a prison sentence rather than granting him probation. We shall affirm the judgment.

In the published portion of this opinion we discuss the importance of careful handling of notices of appeal.

FACTS

Because the matter was resolved without trial, our statement of facts is taken from the probation officer's presentence report.

Defendant started a "verbal argument" with the female victim, whom he considered to be his girlfriend, at the bar where she worked. Defendant was thrown out of the bar and later went to the victim's home where he started arguing with her again. This time the argument became physical: defendant choked the woman to unconsciousness, leaving bruising on her neck. Another visitor to the home helped the victim pull away from defendant.

When the victim sought medical treatment the next afternoon, she was complaining of difficulty swallowing, neck pain, eye sensitivity to light, and a headache. An examining doctor indicated that the woman's injuries -- blood vessel

hemorrhaging in both eyes and obvious marks on her neck -- were consistent with her having been choked.

When contacted by police, defendant admitted that he had pushed the victim onto the bed and had strangled her with enough pressure to cause bruising.

DISCUSSION

I.

The offense occurred on the night of August 20, 2005. Defendant entered his plea on October 14, 2005. He was sentenced on November 23, 2005, and he filed his notice of appeal that same day.

The superior court clerk must "promptly mail" to the Court of Appeal notification of the filing of a notice of appeal. (Cal. Rules of Court, rule 8.304(c)(1); further rule references are to these rules.) "The failure of a court reporter or clerk to perform any duty imposed by statute or these rules that delays the filing of the appellate record is an unlawful interference with the reviewing court's proceedings. . . ." (*Id.*, rule 8.23.)

However, it was not until March 11, 2008, that notice of filing the notice of appeal was mailed. In a declaration, the Appeals Clerk for the Amador County Superior Court stated that she had just discovered that this appeal, and two others, had been "filed and forgotten," and that defendant, who had received a two-year sentence, "is more than likely out of prison by now."

Once we were notified of the delay in these cases, we processed them expeditiously.

In 1935, the mishandling of a timely notice of appeal resulted in defendant Rush Griffin's execution before his appeal could be heard. The ensuing furor led to the "automatic" appeal procedure now employed in capital cases. (See *People v. Massie* (1998) 19 Cal.4th 550, 566-567.)

We do not equate the consequences to Griffin with the possible consequences to Grimes. But that extreme example highlights the importance of proper handling of notices of appeal in felony cases. As it happens, we affirm the judgment, so defendant Grimes has not been prejudiced.

This does not mean that a clerical mistake resulting in a delayed appeal will always be without consequences. If an appeal had merit, the delay could mean a person suffered an unwarranted period of incarceration, or unwarranted collateral consequences.

Because of this incident, and the trial court's prompt acknowledgement of the problem, we are confident that procedures will be modified so that the mistake will not be repeated.

II.

Defendant contends the denial of probation was an abuse of discretion. Recognizing that probation was statutorily unavailable absent unusual circumstances where it would serve the interests of justice (§ 1203, subd. (e)(3)), he claims the present circumstances were unusual in that the "crime was minimal, in comparison to others falling under these statutes." We are not persuaded.

Background

The trial court found that, in committing counts I and II, defendant personally inflicted great bodily injury and intended to cause great bodily injury within the meaning of section 1203, subdivision (e)(3), and thus was presumptively ineligible for probation. The court announced its intent to follow the probation officer's recommendation of imprisonment for the middle term of three years.

In response, defense counsel argued for the mitigated term based on defendant's age (47 years), lack of criminal history, lack of prior acts of violence, early admission of his conduct to law enforcement officers, good behavior in jail, lack of a weapon, lack of monetary loss, and lack of criminal sophistication.

The trial court concluded that defense counsel had made a "pretty good argument for mitigation," but he had failed to "state an unusual circumstance that would justify Probation." Finding no circumstances in aggravation and four circumstances in mitigation, the court imposed the low term of imprisonment.

Analysis

"All defendants are eligible for probation, in the discretion of the sentencing court [citation], unless a statute provides otherwise.' [Citation.] 'The grant or denial of probation is within the trial court's discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion. [Citation.]" [Citation.] 'In reviewing [a trial court's determination whether to grant or deny probation,]

it is not our function to substitute our judgment for that of the trial court. Our function is to determine whether the trial court's order granting [or denying] probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances.' [Citation.]" (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311.)

Defendant acknowledges that probation was statutorily unavailable absent unusual circumstances where it would serve the interests of justice. (§ 1203, subd. (e)(3); rule 4.413.) The probation limitation in this case is set forth in section 1203, subdivision (e)(3): "Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted" to a person "who willfully inflicted great bodily injury" during the crime.

He claims that notwithstanding the limitation, "the rule of court criteria for making probation determinations [citations] strongly indicate a probation order in this case." His argument appears to be based upon rule 4.413(c)(1)(A), which provides a basis for finding an unusual case warranting probation where: "The fact or circumstance giving rise to the limitation on probation is, in this case, substantially less serious than the circumstances typically present in other cases involving the same probation limitation, and the defendant has no recent record of committing similar crimes or crimes of violence."

Defendant has not shown that the present episode of apparent domestic violence, in which he physically attacked the

victim to the point of unconsciousness, is "substantially less serious" than in other cases where probation is so limited.

(§ 1203, subd. (e); rule 4.413(c)(1)(A).)

The record does not support defendant's argument that the crime was "minimal" in that the victim "suffered only momentary or transitory injury." The probation report notes that the victim "waited to be treated out of fear of the defendant." Evidently, she did not see a physician until some time the following day. Because her bodily injuries were visible at that time, defendant's depiction of them as "momentary" lacks merit. Because no followup medical treatment is shown on this record, his depiction of the injuries as "transitory" is speculative.

This leaves defendant's claims that the crime involved extreme emotion and a sudden outburst, not a planned act; and that he did not use a weapon, had no prior record, was willing and able to comply with probation, was gainfully employed, and was remorseful. Whether viewed singly or in combination, these factors do not show that the trial court's ruling was "so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377; see *People v. Stuart* (2007) 156 Cal.App.4th 165, 179.) "'The fact that a trial judge uses his discretion in a manner different from that requested or suggested, does not mean that the trial judge has abused his discretion.' [Citations.]" (*People v. Myers* (1984) 157 Cal.App.3d 1162, 1169.) Defendant has not shown an abuse of discretion. (*People v. Weaver, supra*, 149 Cal.App.4th at p. 1311.)

DISPOSITION

The judgment is affirmed.

_____, MORRISON, J.*

We concur:

_____, NICHOLSON, Acting P. J.

_____, ROBIE, J.

* Retired Associate Justice of the Court of Appeal, Third Appellant District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.